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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/480,974    01/11/00    HUPP

M    7905

EXAMINER
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027752    QM32/0314  
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CASTELLANO, S	
ART UNIT	PAPER NUMBER

3727  
DATE MAILED:

*3*  
03/14/01

**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**

# Office Action Summary

Application No.

09/480,974

Applicant(s)

Hupp

Examiner

Castellano

Group Art Unit

3727

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).

## Status

- ☐ Responsive to communication(s) filed on \_\_\_\_\_.
- ☐ This action is **FINAL**.
- ☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

## Disposition of Claims

- ☒ Claim(s) 1-13 is/are pending in the application.  
Of the above claim(s) 11-13 is/are withdrawn from consideration.
- ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- ☒ Claim(s) 1-10 is/are rejected.
- ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- ☒ Claim(s) 1-13 are subject to restriction or election requirement.

## Application Papers

- ☐ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.
- ☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.
- ☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.
- ☒ The specification is objected to by the Examiner.
- ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119 (a)-(d)

- ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
  - ☐ All ☐ Some\* ☐ None of the CERTIFIED copies of the priority documents have been received.
  - ☐ received in Application No. (Series Code/Serial Number) \_\_\_\_\_.
  - ☐ received in this national stage application from the International Bureau (PCT Rule 1.7.2(a)).

\*Certified copies not received: \_\_\_\_\_

## Attachment(s)

- ☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 2 ☐ Interview Summary, PTO-413
- ☒ Notice of Reference(s) Cited, PTO-892 ☐ Notice of Informal Patent Application, PTO-152
- ☐ Notice of Draftsperson's Patent Drawing Review, PTO-948 ☐ Other \_\_\_\_\_

Office Action Summary

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

I. Claims 11-13, drawn to a method of using a container, classified in class 277, subclass 1.

II. Claims 1-10, drawn to a container, classified in class 220, subclass 4.23.

2. The inventions are distinct, each from the other because of the following reasons:

Inventions II and I are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (MPEP § 806.05(h)). In the instant case, the product can be used in a different process which doesn't require a cover, slider, track or terminal ends of the track. The cover can be sealed by hand and opened by hand.

3. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

4. During a telephone conversation with Mr. Huston on February 28, 2001 a provisional election was made without traverse to prosecute the invention of the container, claims 1-10.

Affirmation of this election must be made by applicant in replying to this Office action.

Claims 11-13 have been withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

5. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: The specification doesn't state what is stated in lines 3-5 of claim 2 that said track and said seal being congruent for a sector of said perimeter and being spaced apart from said

11-13 stand w/d

keep

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perimeter at a point circumferentially displaced from said sector.

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claim 10 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

8. Claim 10 recites the limitation "said hinge" in line 1. There is insufficient antecedent basis for this limitation in the claim.

9. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

10. Claims 1-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Edwards et al. (Edwards).

Claim 1 contains mostly functional language of the intended use of a container. There is no cover, slider or track claimed. The container of claim 1 has an aperture with a perimeter. Claim 2 similarly contains mostly functional language of the intended use of a container. The container of claim 2 has a perimeter. Edwards discloses a container comprising a cover with a perimeter having an outwardly extending flange, an annular seal is provided by annular protrusion

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(38) on the flange and an annular groove (40) on the underside of the cover which surrounds the aperture and is sealable around the entire perimeter. A slider can be formed from a user's fingers when the user slides one finger along the groove formed on the underside of the projection and another finger along the projection formed on the top of the groove when the cover is closed.

The path that the fingers traverse is considered a track and the track has a portion which is spaced apart from the seal when the seal is closed and the fingers are slid towards a back hinged edge of the container.

11. Claims 1-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Fallowfield.

Claim 1 contains mostly functional language of the intended use of a container. There is no cover, slider or track claimed. The container of claim 1 has an aperture with a perimeter.

Claim 2 similarly contains mostly functional language of the intended use of a container. The container of claim 2 has a perimeter. Fallowfield discloses a container and a cover, an annular C-shaped seal is formed between the cover and the container.

12. Claims 1-3 and 8-10 are rejected under 35 U.S.C. 102(b) as being anticipated by Thomas.

Claim 1 contains mostly functional language of the intended use of a container. There is no cover, slider or track claimed. The container of claim 1 has an aperture with a perimeter.

Claim 2 similarly contains mostly functional language of the intended use of a container. The container of claim 2 has a perimeter. Thomas discloses a bag container which could be closed by a cover. The bag has a seal which is closed by a slider which slides along a track.

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13. Claims 1-10 are rejected under 35 U.S.C. 103(a) as being obvious over Hupp et al. (6,092,687)

(Hupp).

The applied reference has a common assignee with the instant application. Based upon the earlier effective U.S. filing date of the reference, it constitutes prior art under 35 U.S.C. 102(e). This rejection under 35 U.S.C. 103(a) might be overcome either by a showing under 37 CFR 1.132 that any invention disclosed but not claimed in the reference was derived from the inventor of this application and is thus not the invention "by another," or by a showing of a date of invention for the instant application of any unclaimed subject matter prior to the effective U.S. filing date of the reference under 37 CFR 1.131.

Claim 1 contains mostly functional language of the intended use of a container. There is no cover, slider or track claimed. The container of claim 1 has an aperture with a perimeter. Claim 2 similarly contains mostly functional language of the intended use of a container. The container of claim 2 has a perimeter. Hupp discloses all the elements and more elements such as the cover, slider and track. It would have been obvious to remove the cover, slider and track while preserving the functional limitations and the intended use of the container to be sealable by a cover with a slider, which is slidable along a track in order to easily manufacture one piece without being concerned with the assembly of the cover, slider and track.

omit 14. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686

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F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).


A timely filed terminal disclaimer in compliance with 37 CFR 1.321© may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

- omit 15. Claims 1-10 are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-10 of U.S. Patent No. 6,092,687 to Hupp et al. (Hupp). Although the conflicting claims are not identical, they are not patentably distinct from each other because it would have been obvious to remove the cover, slider and track while preserving the functional limitations and the intended use of the container to be sealable by a cover with a slider, which is slidable along a track in order to easily manufacture one piece without being concerned with the assembly of the cover, slider and track.
16. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.
17. In order to reduce pendency and avoid potential delays, Group 3720 is encouraging FAXing of responses to Office Actions directly into the Group at (703)305-3579. This practice may be used for filing papers not requiring a fee. It may also be used for filing papers which require a fee by applicants who authorize charges to a PTO deposit account. Please identify the examiner and art unit at the top of your cover sheet. Papers submitted via FAX into group 3720 will be promptly forwarded to the examiner.

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18. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stephen J. Castellano whose telephone number is (703)-308-1035.

  
Stephen Castellano  
Primary Examiner  
Art Unit 3727

March 7, 2001